Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

J.A. CROSON COMPANY,

Petitioner,

v.

CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio Twelfth Appellate District

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

I. CONTRARY TO RESPONDENT FOX MECHANICAL COMPANY'S MANY ASSERTIONS THAT JOB TARGETING AND DUES DEDUCTIONS ARE AT ISSUE HERE – THE ISSUES PRESENTED TO THIS COURT BY PETITIONER ADDRESS NLRA PREEMPTION OF STATE LAWS THAT REGULATE COLLUSION OR ILLEGAL TRANSFER OF INFORMATION IN THE CONTEXT OF JOB TARGETING PROGRAMS.

A. Job Targeting And Dues Deductions Are Not At Issue Here.

Respondent Fox Mechanical Company ("Fox") dedicates a significant portion of its brief to arguing the validity of job targeting and dues deductions from worker's paychecks. These issues are simply not at issue here and thus, the Respondent's arguments are not responsive to the controversy in this case. As set out in Croson's Petition, the issues presented concern the specific situation where job targeting programs are used to aid collusion or the illegal transfer of information among bidders on public contracts in violation of Ohio law.

The validity of job targeting programs themselves, or deductions from worker's paychecks to fund these programs, are not the issues raised by Croson's Petition. Nevertheless, Fox, in an attempt to argue a different case, focused on the validity of these deductions or check-offs. Again, this is not the issue at hand. Rather, the issue is what happens when an allegation is made that during the bidding process for a particular job, information about union contractors' bids has been leaked or transferred through the job targeting program to other union bidders.

That is, what happens if the job targeting programs are used to illegally transfer bid information? More specifically, can the State of Ohio through its anti-collusion statute, or the School Board, through its own affidavit, prohibit this type of collusion between bidders on state jobs? The crux of the problem here is that the state courts in Ohio, contrary to federal precedent, have wrongly concluded that this issue is preempted by the National Labor Relations Act ("NLRA"). It is on these issues that Croson seeks the Court's guidance, not the issues dealing with the validity of job targeting programs themselves or the deductions or check-offs used to fund the programs. In short, the issues here relate to the transfer of information, not the transfer of money from worker's paychecks.

B. Notwithstanding The Fact That Job Targeting Deductions Are Not The Focus Of This Petition, Federal Courts Have Ruled That Job Targeting Deductions Are Not "Union Dues."

In addition to arguing the facts and omitting the fact that Croson's Amended Complaint did in fact make the specific allegation of collusion by the union, Fox's Brief in Opposition is riddled with misstatements of law and misleading arguments. For example, even in light of the fact that the act of collusion is the center of this controversy, Fox attempts to mislead this Court by misstating the law as it relates to the classification of job targeting deductions. As set out in Croson's Petition, job targeting deductions have been held by several federal courts *not* to be "union dues" and thus, any argument attempting to classify these deductions as union dues for the purpose of invoking NLRA preemption is incorrect and misleading.

Building & Constr. Trades Council v. Reich, 40 F.3d 1275 (1994), reh'g denied, (Feb. 16, 1995); *International Bhd. of Elec. Workers, Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995); (Croson Pet. at 19-21). Furthermore, Fox incorrectly states that the holdings in *Reich* and *Brock* are inapposite. (Fox's Brief at 17). This is simply not true, in both of these cases the courts held that job targeting deductions are not "union dues" and are illegal. The fact that these holdings are under the Federal Davis-Bacon Act as opposed to the State of Ohio's little Davis-Bacon Act does not magically transform the character of these deductions to "union dues."

In addition, Fox attempts to argue that job targeting dues deductions are covered by § 302 of the NLRA. Yet, Fox ignores the fact that the D.C. Circuit in *Reich* and the Ninth Circuit in *Brock* both ruled on the issue of job targeting deductions without being preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In short, these cases are not inapposite as Fox suggests. To the contrary, these cases buttress Croson's position and serve to illustrate the conflict between the Ohio and federal courts.

Fox also misread this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), by stating that "issues over the collection and use of union dues, fees and assessments, and claims against an employer about the collection and use of such funds, are governed by § 8 of the NLRA and preempted under Garmon." (Fox's Brief at p. 9). That is a direct misstatement of this Court's holding in *Beck*. The only claim held to be preempted was where a specific violation of § 8(a)(3) of the NLRA *was*

alleged. Beck, supra at 742. The other two claims concerning the collection of funds for the use of non-collective bargaining activities were *not* preempted and were allowed to go forward on their merits. *Id.*

II. CONTRARY TO RESPONDENT CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT'S ASSERTIONS THAT THIS CASE IS MOOT OR OTHERWISE NOT RIPE FOR REVIEW, THE ISSUES AT STAKE NOT ONLY AFFECT THE PETITIONER'S DAMAGE CLAIMS BUT ULTIMATELY IMPACT THE RIGHTS OF THE FIFTY STATES TO REGULATE COLLUSIVE ACTIVITY ON PROJECTS WHERE UNIONS IMPLEMENT JOB TARGETING PROGRAMS.

A. The Lower Court Ruled That The Issues Raised By Petitioner Were Preempted By The NLRA – Thus, It Is The Issue Of Preemption That Requires Adjudication Not The Factual Claims Of Petitioner.

The Respondent Central Ohio Joint Vocational School District ("JVSD") through its brief in opposition is attempting to distract this Court from the true issues in dispute. The issues at stake here deal with federal preemption. Respondent JVSD at the outset of its brief tries to define "what this case is not about" by arguing that Croson's amended complaint never became part of the record and that because of this the Court may not consider the Petitioner's Amended Complaint and more specifically, the Ohio anti-collusion statute pled therein. (JVSD's Brief at 1). The fact of the matter is, the trial court based its decision to deny the Petitioner's motion to

amend its complaint on the grounds that the Petitioner's claims were preempted by the NLRA. It is this determination of preemption that is at issue.

In its April 11, 1994, decision and entry, the trial court held that job targeting "is not collusive as a matter of law" *J.A. Croson Co. v. Central Ohio JVSD*, No. 94CV-03-039 (Ohio C.P. Madison County April 11, 1994) (Pet. App. 10a). The court based that holding on *Independent Elec. Contractors of Cincinnati v. County of Hamilton*, 101 Ohio App. 3d 580, 656 N.E.2d 18 (1st Dist. 1995) (Pet. App. 17a-18a). Ultimately, it was the *I.E.C.* court that started the ball rolling by incorrectly applying *Garmon* and thus finding that issues involving job targeting are preempted by the NLRA. *Id.* The Twelfth District Court of Appeals, following suit, also misapplied *Garmon* and found that collusion issues in the context of job targeting are preempted by the NLRA. *J.A. Croson Co. v. Central Ohio JVSD*, No. CA94-07-026 (Ohio App. 12th Dist. May 30, 1995). As a result of these misguided decisions, the Petitioner's motion to amend its complaint was denied on preemption grounds.

The Petitioner seeks review of the lower court's holding as it pertains to preemption. Respondent JVSD wants to argue facts that are definitely not in the record and irrelevant to the issue of preemption that was decisive in the courts' decisions below. The amended complaint was only intended to set forth a *damage* claim after the trial court stated that Croson had an adequate remedy at law and denied the injunction on April 11, 1994.

By accepting this case, this Court can correct a prior error and rule that collusive activity is not preempted by

the NLRA just because the collusion takes place or is aided by a job targeting program. Thus, JVSD's arguments regarding the exclusion of the amended complaint are misleading and are not of any assistance in determining what are the real issues asserted by the Petitioner.

B. An "Undeveloped Factual Record" Is Not A Bar To Review As The Issues Here Are Based On A Conflict Of Law Between State And Federal Courts.

JVSD would have this Court believe that this case is moot and that the issues raised by Croson will never arise again. (JVSD's Brief at 9). These assertions are false. As Croson set out in its Petition, until this Court sets the record straight, this fundamental issue of preemption will continue to be the center of controversy as a result of the direct conflict in precedent between state and federal courts. Furthermore, contrary to JVSD's assertion, this issue will arise every time a contractor asserts that collusion has taken place by means of a job targeting program.

JVSD further asserts that the Court should not address this issue because the "record is undeveloped." (JVSD's Brief at 11). First, the record is undeveloped because the trial court declined jurisdiction based on preemption by the NLRA. If this Court were to credit JVSD's argument that it can only review a case with a developed factual record, then this issue, or any jurisdictional issue for that matter, would never be resolved because the issue of preemption will always be raised at the outset of the case, effectively preventing a complete factual record from being developed. Second, the issues

before this Court do not depend on a factual analysis. Although Croson has alleged in its amended complaint that collusion has taken place, it has not had the opportunity to address this claim because the lower courts held that Croson's claims were preempted by the NLRA. (Pet. App. at 25a). Croson only seeks the opportunity to prove its case, and its Petition does not urge this Court to make a factual determination or to declare that Croson is entitled to damages. Rather, Croson's Petition requests this Court to set straight the conflict that exists between the Ohio and the federal courts as to whether or not claims based on collusion are preempted by the NLRA merely because the alleged means or tool for the collusion was a job targeting program. The issues at stake here solely rely on an analysis of law.

CONCLUSION

As the Ohio and federal cases on this issue of preemption demonstrate, job targeting programs are used by unions throughout this Country and involve literally tens of millions of dollars. Failure on this Court's part to clearly define the law on preemption will allow the union to continue their illegal activity using "preemption" as their shield to engage in collusion and diversion of funds with impunity. The *only* projects protected from this activity will be federal projects. States will be helpless to

defend themselves. This Court cannot stand by and let this situation continue to exist.

Respectfully submitted,

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